

# FEIN & FEIN

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February 3, 2003

Electronic Filing

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room TWB-204  
Washington, D.C. 20554

RE: Notice of Written Ex Parte Communication, In the Matter  
of Appropriate Framework for Broadband Access to the  
Internet Over Wireline Facilities, CC Docket Nos. 95-  
20, 98-10, and 02-33.

Dear Ms. Dortch:

On February 3, 2003, the attached letter by Bruce Fein was  
sent to the Chairman and Commissioners.

One copy of this Notice is being submitted for each of the  
referenced proceedings in accordance with the Commission's rules.

Sincerely,

Bruce Fein

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## EX PARTE

Honorable Michael Powell  
Chairman  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Eighth Floor  
Washington, D.C. 20554

RE: In the Matter of Appropriate Framework for Broadband  
Access to the Internet Over Wireline Facilities, CC  
Docket Nos. 95-20, 98-10, and 02-33.

Dear Mr. Chairman:

As former general counsel of the Federal Communications Commission and contributing editor to Tech Central Station, I am writing to urge against the Commission's adoption of a rule that would virtually echo the Tauzin-Dingell legislation for broadband that Congress has refused to enact and evict States from their customary partnership role in telecommunications policy. For an unelected Commission to trump the policy wisdom of elected and accountable representatives of the people in Congress wrenches separation of powers principles and epitomizes agency arrogance. Moreover, federalism is a treasured feature of our constitutional dispensation by favoring local solutions to local problems and experimentation in 50 State laboratories where, as here, policy wisdom can only be dimly perceived.

Tauzin-Dingell would generally eliminate any unbundling requirement for broadband. Thus, section 4(b) of H.R. 1542 provides: "[N]either the Commission nor any State shall (i) require an incumbent local exchange carrier to provide unbundled access . . . to any packet switching network element; (ii) require an incumbent local exchange carrier to provide, for the provision of high speed data service, access on an unbundled basis . . . to any fiber loop or feeder subloop; or require an incumbent local exchange carrier to provide for collocation . . . in a remote terminal, or to construct or make available space in a remote

terminal." It further stipulates: "[N]either the Commission nor any State shall construe, interpret, or apply this section in such manner as to expand an incumbent local exchange carrier's obligation, as in effect on May 24, 2001, to provide access . . . to any network element for the provision of high speed data service, or to provide collocation . . . for the provision of high speed data service."

Verizon, in a January 17, 2003 letter initialed by Executive Vice President and General Counsel William P. Barr, generally aped Tauzin-Dingell in pleading for wholesale lifting of restrictions on broadband provided by incumbent local exchange carriers. Mr. Barr insisted: "[L]ocal telephone companies should not be required to provide unbundled elements for use to provide broadband services." He further maintained: "The previous line sharing requirement must be eliminated. . . . Likewise, the requirement to provide collocation at the remote terminal also should be eliminated." Verizon's voice on broadband has been generally parroted by the High Tech Broadband Coalition.

I respectfully submit that independent agencies like the Commission are creatures of Congress; that Congress did not intend policy debates in its chambers addressing pivotal telecommunications issues such as broadband to serve as mere dress rehearsals for final performances before the subordinate Commission it created. That would turn a fundamental constitutional principle on its head. And it seems especially audacious for the Commission to oust the States from joint participation in broadband policy when Congress has desisted from such an encroachment on federalism.

Sincerely,

Bruce Fein

cc: Commissioner Kevin J. Martin  
Commissioner Kathleen Q. Abernathy  
Commissioner Jonathan S. Adelstein  
Commissioner Michael J. Copps  
Office of the Secretary (via electronic filing)